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Supreme Court, U.S.
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No. 02-1540

IN THE

Supreme Court of the United States

ROBIN PASSARO LOUQUE, Individually and on Behalf of All Others Similarly Situated,

Petitioners,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondent's opposition explicitly acknowledges the circuit split and does not contest that the question presented is important and worthy of review. It argues only that petitioner Louque lacks standing and that this case is not a proper vehicle to decide whether 28 U.S.C. § 1367 overruled this Court's decision in *Zahn*. Neither contention is correct.

I. Respondent's Standing Argument Is Meritless.

Respondent argues that petitioner Louque lacks standing. Respondent asserts that Louque does not dispute that "the federal court had original jurisdiction over her individual claims," and concludes therefore that because "the judgment dismissing her claims is now final," "she is not eligible to pursue claims for the class." Opp. 4. Both respondent's premise and conclusion are wrong.

Petitioners' fundamental submission to this Court is that the federal court did *not* have "original jurisdiction" over Louque's claims, because, in a class action, "original jurisdiction" only exists when both the named plaintiffs *and* the absent class members individually have the requisite amount in controversy. *See* Petition 10-11. The dismissal of petitioners' claims on the merits is irrelevant to the question whether Louque has suffered injury and thus has standing to seek relief from this Court. If this Court holds that *Zahn* remains good law, there was no basis for the district court to have exercised jurisdiction over her or any other class member and thus no basis for finding that Louque had the requisite amount in controversy, which was premised entirely on attributing all of the absent class members' claims for attorney's fees to the named plaintiff Louque. The district court would then have been without diversity jurisdiction under 28 U.S.C. § 1332, and it would have been required to remand the case to the Louisiana

state court from which it was improperly removed.

Respondent's view of standing makes no sense. Under it, the court of appeals' affirmance of the dismissal on the merits would insulate its jurisdictional ruling from review in this Court even if that dismissal was issued by a court that never had subject matter jurisdiction — in direct contravention of this Court's admonition that federal courts must assure themselves of their own jurisdiction before ruling on the merits. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1997).[1]

Respondent fails to mention that *In re Abbott Laboratories*, 51 F.3d 524 (5th Cir. 1995) ("*Abbott Labs*"), *aff'd by an equally divided court sub nom. Free v. Abbott Laboratories*, 529 U.S. 333 (2000), was in exactly the same procedural posture as is this case. There, when this Court granted review, the class had not been certified, and the Fifth Circuit had ruled that (1) the named plaintiffs had the requisite amount in controversy because of class action attorney's fees arising from the absent class members' claims; (2) the district court properly exercised jurisdiction under section 1367, even though the absent class members did not individually have the requisite amount in controversy; and (3) the state-law claims had been properly dismissed on the merits. *See Abbott Labs*, 51

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[1]Respondent's standing argument appears to give great weight to the fact that petitioners do not contest the dismissal on the merits *in this Court*. Opp. 5 ("Louque does not contest that dismissal" in the petition); *see also* Opp. 3 ("Louque does not challenge here the court's dismissal of ... her claims"). However, petitioners could not have challenged the Rule 12(b)(6) dismissal before this Court because that dismissal involved solely issues of Louisiana law, which this Court does review on certiorari.

F.3d at 526-29; *Free v. Abbott Laboratories, Inc.*, 176 F.3d 298 (5th Cir. 1999). On review before this Court, the parties in *Abbott Labs* understood that jurisdiction was logically the first question in the case, and thus the dismissal on the merits did not defeat the plaintiffs' standing to challenge the Fifth Circuit's holding on the supplemental jurisdiction question.

Respondent's standing argument fails for an additional reason. The opposition addresses only *petitioner Louque's* standing; however, the petition was filed on behalf of Louque *and the class that she represents*. Although the class action was never certified, the lower courts' assertion of supplemental jurisdiction over the class members injured them because it deprived them of the right to present their class action suit to the state court in which it was filed. To be sure, after the Fifth Circuit's ruling below, the absent class members are free, in theory, to file another class action in Louisiana state court headed by a named plaintiff other than Louque. However, if they were to do so, respondent would again remove on the basis of the Fifth Circuit's ruling in *Abbott Labs,* and the case would again be dismissed on the basis of the Fifth Circuit's ruling below. The class members' injury — deprivation of the right to maintain their small claims class action in state court — would be remedied by a ruling of this Court that *Zahn* was not overruled by 28 U.S.C. § 1367, and the class members have standing for this reason as well.

II. Contrary To Respondent's Assertions, This Case Presents An Ideal Vehicle To Decide The Issue That This Court Was Unable To Resolve In *Abbott Labs.*

Respondent acknowledges the circuit split, but maintains that this case is a "procedurally inappropriate vehicle" for deciding the question that this Court considered

(but was unable to resolve) in *Abbott Labs*. Opp. 6. Respondent is incorrect.

Respondent argues first that the Court should deny review because the *Zahn* issue was not litigated below. In both the district court and the court of appeals, petitioners argued that the district court lacked diversity jurisdiction over both Louque and the unnamed class members because relevant Louisiana law did not permit attribution of class action attorney's fees to petitioner Louque. The parties did not specifically address the issue of *Zahn*'s continued vitality in their court of appeals' briefs for an obvious reason: That issue has been settled law in the Fifth Circuit since 1995, when that court held that section 1367 overruled *Zahn*, *Abbott Labs*, 51 F.3d 524, and denied rehearing en banc without a single vote to the contrary. 65 F.3d 33 (5th Cir. 1995). Thus, respondent's lament that the *Zahn* issue was neither "briefed nor argued in the courts below" (Opp. 6) rings hollow: The decisions in those courts were preordained and full briefing would have served no conceivable purpose. More importantly, respondent does not explain why some other case would be a better vehicle to resolve the deep and intractable conflict in the circuits.[2]

Moreover, even if there were a plausible argument that petitioners failed to preserve the *Zahn* question, that would not matter in this case, because the question presented goes to the district court's subject matter jurisdiction. This Court has said

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[2]Respondent's statement that the *Zahn* issue was "only summarily referred to" in the decision below (Opp. 6) underscores our point: The issue was dealt with summarily because it is settled law in the Fifth Circuit.

time and again that both it and the lower federal courts are obligated to raise jurisdictional issues on their own, even when the parties do not. *See, e.g., Steel Co.*, 523 U.S. at 94-96; *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). That being the case, the Court can and should entertain a petition that *does* raise a question of subject matter jurisdiction, even where it was not argued below. That conclusion follows *a fortiori* from *Nguyen v. United States*, __ S. Ct. __, 2003 WL 21310207 (June 9, 2003). There, the Court granted certiorari in two cases presenting the question whether a judgment in a federal criminal appeal is valid if one of the members of the appellate panel is not an Article III judge, even though neither petitioner raised that issue until filing his petition for a writ of certiorari. *Id.* at *3.

Finally, respondent argues that the Court should deny review because petitioners' opposition to the Rule 12(b)(6) dismissal was "perfunctory," demonstrating that their claims on the merits are "groundless." Opp. 6 & n.3. We strenuously disagree for two reasons. First, in the district court, petitioners filed a detailed memorandum explaining why respondent's policy of not settling third-party insurance claims violated Louisiana law. *See* Mem. in Opp to Allstate's Motion to Dismiss (Doc. 8), in *Louque, et al. v. Allstate Ins. Co.*, No. 01-1282 (E.D. La.) (filed June 6, 2001). In the court of appeals, although petitioners' principal focus was the district court's lack of subject matter jurisdiction and thus its error in not remanding the case to state court, they devoted an entire section of their appellate brief to explaining why the district court erred, as a matter of Louisiana law, in granting the motion to dismiss. *See* Brief for Appellant, at 15-17, in *Louque, et al. v. Allstate Ins. Co.*, No. 01-30857 (5th Cir.) (filed Sept. 18, 2001) (argument heading: "The District Court Committed Manifest Error in Granting Allstate's Motion to Dismiss Class Action

Petition").

Second, and more fundamentally, petitioners would have been within their rights to challenge only the district court's failure to remand the class action back to state court. If, as petitioners maintain, the district court lacked subject matter jurisdiction when it considered the Rule 12(b)(6) motion, the district court's resolution of the Louisiana law issues presented in petitioners' state court complaint is irrelevant. And that is certainly true at this juncture, where the only question is whether the district court erred in exercising subject matter jurisdiction and depriving petitioners of the right to have their claims adjudicated in the Louisiana courts.[3]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[3]Respondents seek support from this Court's denials of review in *Grant v. Chevron Phillips Chemical Co.*, 309 F.3d 864 (5th Cir. 2002), *cert. denied*, 122 S. Ct. 1634 (2003), and *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001), *cert. denied sub nom., DaimlerChrysler Corp. v. Gibson*, 534 U.S. 1104 (2002). But as explained in the petition (at 7-8 n.2 and 9 n.3, respectively), *Grant* presented only state-law issues, and *Gibson* presented the question whether diversity jurisdiction in a class action may be maintained when the *named* plaintiff does not have more than $75,000 in controversy, an issue on which the courts of appeals were not (and are not) in conflict. *See* Resp. Br. in Opp., at 3-5, in *DaimlerChrysler Corp. v. Gibson*, No. 01-688 (filed Dec. 10, 2001).

Respectfully submitted,

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